No. 13142

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

GORDON DARCY,

Appellant,

v.

ROBERT A. HEINZE, etc.,

Appellee.

On Appeal From the United States District Court for the Northern District of California, Northern Division

BRIEF FOR APPELLEE

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IN THE

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On Appeal From the United States District Court for the Northern District of California, Northern Division

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

On July 3, 1951, appellant filed a petition for writ of habeas corpus with the United States District Court, for the Northern District of California, Northern Division. (Tr. 1-52.) On July 16, 1951, Honorable Dal. M. Lemmon, Judge of the United States District Court for the Northern District of California, Northern Division, issued his order that the petition be dismissed on the ground that there was no allegation of exhaustion of state remedies which was a necessary allegation (Tr. 68). Thereafter and on July 28, 1951, appellant filed a motion to vacate order of dismissal

and to hear the petition for habeas corpus together with a request for a certificate of probable cause and permission to proceed in forma pauperis (Tr. 54-64, 69-71). On August 6, 1951, the Honorable Dal. M. Lemmon, District Judge, denied the motion to vacate order of dismissal of July 16, 1951, and further declined to issue a certificate of probable cause (Tr. 65). On August 22, 1951, the petition of appellant for leave to prosecute his appeal in forma pauperis was granted and a certificate of probable cause issued by this court (Tr. 66). On October 26, 1951, the record on appeal in this matter was filed with this court.

HISTORY OF PRIOR PROCEEDINGS

Petitioner was charged by an amended information by the District Attorney of Los Angeles County, with the crime of kidnapping for the purpose of robbery committed against Speropoulos and Simonsen, and it was alleged that they were subjected to bodily harm; and he was also charged with four other robbery counts, it being alleged that the acts occurred at the same time, and at which time defendant was armed with a deadly weapon, and said information also charged petitioner with three prior felony convictions. He pleaded not guilty to each count of the amended information and admitted the prior convictions. He was convicted on all five counts; the jury determined the punishment for kidnapping to be life imprisonment without parole and each of the robbery counts to be of the first degree. On the kidnapping

count, petitioner was sentenced to the penitentiary for life without possibility of parole, and on each of the robbery counts he was sentenced for the term prescribed by law, all counts to run concurrently.

People v. *Darcy,* 101 Cal. App. 2d 665, 669; 226 P. 2d 53.

On appeal to the District Court of Appeal of the State of California, in and for the Second Appellate District, he attacked his conviction on the following grounds: (1) that the evidence was insufficient to support the convictions; (2) error in admission of evidence; (3) error in instructions given; (4) that sentences were imposed for kidnapping and for robbery, whereas but one criminal offense was committed for which but one sentence could have been imposed.

On this appeal, the District Court of Appeal of the State of California, in and for the Second Appellate District, affirmed the judgment of the trial court upon the petitioner for kidnapping for the purpose of robbery, while armed, and with violence, as charged in Count 1 of the information; reversed the robbery counts charged against the petitioner in Counts 2 and 5 of said information and affirmed the robbery counts charged in Counts 3 and 4 of said information.

People v. *Darcy,* 101 Cal. App. 2d 665, 673; 226 P. 2d 53.

A petition for hearing by the California Supreme Court was denied in this matter on February 8, 1951.

People v. *Darcy,* 101 Cal. App. 2d 665, 673; 226 P. 2d 53.

On both the trial and on appeal petitioner was represented by counsel. No petition for writ of certiorari to review this decision was sought by the petitioner herein from the United States Supreme Court.

Thereafter, and on May 4, 1951, petitioner filed a petition for writ of habeas corpus with the California Supreme Court, numbered Crim. 5225 on the files of said court, which petition alleged the same grounds of illegality of the state court decision as were sought to be presented in the petition for writ of habeas corpus filed herein, namely, (1) that the prosecuting attorney used illegal means and methods to secure the conviction by introducing evidence as to petitioner's prior felony convictions after he had admitted the same; (2) that he was forced to stand trial for a capital offense without having been given a preliminary examination upon said charge; (3) that he was denied the assistance of counsel since his court-appointed counsel did not render effective aid in his defense; and (4) that in view of the circumstances surrounding the case the sentence imposed upon him was cruel and unusual punishment within the meaning of the Eighth Amendment to the United States Constitution. This petition was denied without opinion by the California Supreme Court on May 17, 1951.

No petition for writ of certiorari to review said action of the California Supreme Court was sought by the petitioner herein from the United States Supreme Court.

Instead, on July 3, 1951, he sought a petition for writ of habeas corpus from the United States District Court, for the Northern District of California, Northern Division. (Tr. 1-52.)

SPECIFICATION OF ERROR

Appellant contends that the District Court erred in dismissing his petition for a writ of habeas corpus upon the ground that he did not apply to the United States Supreme Court for a writ of certiorari and in claiming that such was a necessary allegation to show the exhaustion of state remedies.

SUMMARY OF ARGUMENT

I. The Procedure Followed by the District Court in Denying the Petition Without a Hearing Was Proper Under the Statute

II. The Allegations of the Petition for Writ of Habeas Corpus Were Insufficient as Grounds for the Issuance of a Writ

III. Appellant Did Not Exhaust His State Remedies or Demonstrate That Circumstances of Peculiar Urgency Exist

ARGUMENT

I. The Procedure Followed by the District Court in Denying the Petition Without a Hearing Was Proper Under the Statute

In the case of *Dorsey* v. *Gill,* 148 F. 2d 857 (cert. den. 325 U. S. 890), the United States Court of Appeals for the District of Columbia, examined at great length the office and nature of a writ of habeas corpus and the procedure to be followed in federal courts upon an application therefor. The opinion (which is exhaustively annotated and which is noted in *Darr* v. *Burford,* 339 U. S. 200, 70 S. Ct. 587) summarized

the procedure which may be followed by a district court on a petition for the issuance of a writ of habeas corpus and stated (pp. 865-866):

> "There are at least ten such possible alternatives, as follows: (1) When a petition is presented to a judge with a request for leave to file it, the judge may, if the petitioner is not entitled to a writ, deny leave to file it; or (2) he may in the interest of justice—if the petition is insufficient in substance—require petitioner to amend it; or he may require him to show—if the judge is not otherwise informed—whether petitioner has made a prior application and, if so, what action was had on it; (3) he may issue a rule to show cause why leave to file a petition for writ of habeas corpus should not be granted and upon the return, may grant or deny leave to file; (4) after a petition has been filed, if it satisfies the requirements of the statute, the judge should issue the writ forthwith; (5) if, upon consideration of a petition which has been filed, it appears that the petitioner is not entitled to the writ, the court should refuse to issue it; (6) if the allegations of the petition are inconclusive, the judge may issue a rule to show cause why a writ should not be granted, to which the relator may respond; (7) if the procedure suggested in (6) is followed, the facts on which the opposing parties rely having been exhibited to the judge, he may find that no issue of fact or law is involved and may then refuse to grant the writ, in which event it is not necessary to hold a hearing; (8) on the other hand, if the procedure suggested in (6) is followed, the judge may find that the facts admitted—in response to

the order to show cause—entitled the petitioner to the writ and to a discharge, forthwith, as a matter of law; or (9) he may find that an issue is involved; in which event he should grant the writ and require a hearing, the petition and traverse being then treated as, together, constituting the application for the writ, the return to the rule as setting up the facts thought to warrant its denial, and the issues of fact, thus emerging, should be tried as required by that statute; (10) if, as a matter of convenience, the judge—without determining whether the petition is sufficient—issues the writ, he may then, upon the return, hear and dispose of the whole matter at once."

The District Court in the instant matter acted under alternative (5) set forth in *Dorsey* v. *Gill,* 148 F. 2d 857, having considered the petition which had been filed and which showed on its face that the petitioner and appellant herein was not entitled to the writ and found that since there was no necessary allegation of exhaustion of state remedies, the petition should be dismissed (Tr. 68).

From the record of the proceedings heretofore had in this matter and of which the United States District Court could take judicial notice (*Knight* v. *People,* 60 F. Supp. 164; *Tatè* v. *Heinze,* 187 F. 2d 98) it appears that the appellant was charged and convicted in the state courts with four counts of robbery and one of kidnapping for the purpose of robbery, while armed with a deadly weapon, and inflicting bodily harm on the victims as well as three prior felony

convictions and the service of sentence therefor in a state penitentiary. He was represented by counsel at the trial and on appeal.

On appeal, the District Court of Appeal of the State of California, in and for the Second Appellate District, affirmed the judgment imposed upon appellant for kidnapping for the purpose of robbery, while armed, and with violence as charged in Count 1 of the information; reversed the judgment as to Counts 2 and 5 (robbery), and affirmed Counts 3 and 4 as to robbery. (*People* v. *Darcy,* 101 Cal. App. 2d 665; 226 P. 2d 53). A petition for hearing in the California Supreme Court was denied on February 8, 1951 (*People* v. *Darcy,* 101 Cal. App. 2d 665, 673; 226 P. 2d 53).

On May 4, 1951, petitioner and appellant filed a petition for writ of habeas corpus with the California Supreme Court and numbered therein Crim. 5225 attacking the validity of the judgment and commitment under which he was confined on the same grounds as he presented in the application under consideration here.

This petition for writ of habeas corpus was denied without opinion by the California Supreme Court on May 17, 1951. No petition for certiorari to review this decision was sought from the United States Supreme Court.

The petition on its face in the instant matter presents no grounds which have not or could not have been presented hitherto to the state courts on the

original appeal and to the California Supreme Court on the petition for hearing and on habeas corpus both of which were denied. The grounds presented were within the knowledge of the appellant at the time of his original appeal in the state courts.

Salinger v. *Loisel,* 265 U. S. 224, 230; 44 S. Ct. 519;
Darr v. *Burford,* 339 U. S. 200, 70 S. Ct. 587.

It is apparent that on its face the petition does not comply with the provisions of Section 2254, Title 28, United States Code which provides:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

In *Darr* v. *Burford,* 339 U. S. 200; 70 S. Ct. 587, 94 L. Ed. 761, the United States Supreme Court enunciated the rule that accustomed procedure required a petition for certiorari to be made to the United States Supreme Court from a state court's

refusal of collateral relief before a federal district court would consider an application for habeas corpus on its merits. The court there stated (339 U. S. 200, 210-14):

> "In Sec. 2254 of the 1948 recodification of the Judicial Code, Congress gave legislative recognition to the *Hawk* rule for the exhaustion of remedies in the state courts and this Court. This was done by embodying in the new statute the rulings drawn from the precedents. The rulings had been definitely restated in *Hawk*. That case had represented an effort by this Court to clear the way for prompt and orderly consideration of habeas corpus petitions from state prisoners. This Court had caused the *Hawk* opinion to be distributed to persons seeking federal habeas corpus relief from state restraint and the opinion had been generally cited and followed. There is no doubt that Congress thought that the desirable rule drawn from the existing precedents was stated by *Hawk,* for the statutory reviser's notes inform us that
>
> 'This new section is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk,* 1944, 64 S. Ct. 448, 321 U. S. 114, 88 L. Ed. 572.)'
>
> "While this section does not refer expressly to the requirement for application to this Court for review, it must be read in the light of the statement quoted on p. 207, *supra,* from *Hawk*. So read, there was occasion neither for the draftsmen of Sec. 2254 to make reference to review in this Court, nor for the committees of the House or Senate or members of Congress to comment upon

it. It is immaterial whether as a matter of terminology it is said that review in this Court of a state judgment declining relief from state restraint is a part of the state judicial process which must be exhausted, or whether it is said to be a part of federal procedure. The issue cannot be settled by use of the proper words. *Hawk* treated review here as a state remedy. *Wade* thought it was not state procedure. But undoubtedly review here is a part of the process by which a person unconstitutionally restrained of his liberty may secure redress. *Ex parte Hawk* had made it clear that all appellate remedies available in the state court and in this Court must be considered as steps in the exhaustion of the state remedy in the sense that the term is used, perhaps inexactly, in the field of habeas corpus. Consideration of the legislative history of Sec. 2254 reveals no suggestion that the draftsmen intended to alter the sense of the term as defined in *Hawk* or to differentiate between exhaustion of state remedies and review in this Court. All the evidence manifests a purpose to enact *Hawk* into statute. The reviser's notes, explicitly stating this purpose, remained unchanged throughout the bill's legislative progress. So did the statement of the exhaustion principle contained in the first paragraph of Sec. 2254 down to the first 'or'. None of the changes or additions made by the Senate to Sec. 2254 affected the problem of review here. They were directed at other issues.

"It seems sure that Congress drafted and enacted Sec. 2254 expecting review here in conformity with the *Hawk* rule. Nothing indicates to us

a desire on the part of Congress to modify the language. We think the rule of the *Hawk* case that ordinarily requires an effort to obtain review here has been accepted by Congress as a sound rule to guide consideration of habeas corpus in federal courts."

The court also stated (pp. 216-17):

"The answer to petitioner's argument that he should not be required to seek review here from a state's refusal to grant collateral relief before applying to other federal courts involves a proper distribution of power between state and federal courts. The sole issue is whether comity calls for review here before a lower federal court may be asked to intervene in state matters. We answer in the affirmative. Such a rule accords with our form of government. Since the states have the major responsibility for the maintenance of law and order within their borders, the dignity and importance of their role as guardians of the administration of criminal justice merits review of their acts by this Court before a prisoner, as a matter of routine, may seek release from state process in the district courts of the United States. It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court. From this conviction springs the requirement of prior application to this Court to avoid unseemly interference by

federal district courts with state criminal administration."

It is patent in the case at bar that the petitioner and appellant herein has attempted to circumvent the requirements of Section 2254 of Title 28, U. S. C., for he has neither sought certiorari from the United States Supreme Court to review the judgment of the highest state court on his original appeal (*People* v. *Darcy,* 101 Cal. App. 2d 665; 226 P. 2d 53), nor has he sought certiorari from the United States Supreme Court as to the decisions of the California Supreme Court in his collateral attack on the judgment by means of his petition for habeas corpus (Crim. 5225, Cal. Supreme Ct.).

Under the decisions of *Ex parte Hawk,* 321 U. S. 114, *White* v. *Ragen,* 324 U. S. 760, *Darr* v. *Burford,* 339 U. S. 200, and Sec. 2254 of Title 28 U. S. C., the petitioner and appellant has not exhausted his state remedies and his application in the Federal District Court was properly dismissed.

II. The Allegations of the Petition for Writ of Habeas Corpus Were Insufficient as Grounds for the Issuance of a Writ

The petition for writ of habeas corpus herein alleges that the conviction in the state courts was illegal and void on the following grounds: (1) that petitioner's trial in the superior court was not fair and impartial and was contrary to the provisions of the Sixth and Fourteenth Amendments to the Constitution of the United States in that the prosecuting

attorney used illegal means and methods of obtaining the conviction by the introduction of evidence contrary to the provisions of Sections 1025 and 1093 of the California Penal Code and Section 2051 of the California Code of Civil Procedure; (2) that the petitioner was forced to stand trial for a capital offense without having said charge submitted for inquiry before a committing magistrate, nor was he committed by any committing magistrate for a capital offense; (3) that his court-appointed attorney did not render effective aid in petitioner's defense and therefore petitioner was denied the assistance of counsel within the constitutional meaning of that term; and (4) in view of the circumstances of this case the sentence imposed upon petitioner amounted to cruel and unusual punishment within the meaning of the Eighth Amendment to the Constitution of the United States (Tr. 2-4).

A. THE TRIAL OF PETITIONER WAS NOT IN VIOLATION OF EITHER THE FEDERAL OR STATE CONSTITUTIONS

As to the appellant's first contention that by reason of the admission of certain improper evidence, his trial was unfair and not impartial, this point was presented to the District Court of the State of California, in and for the Second Appellate District, on appellant's original appeal and the ruling of the District Court thereon was as follows (*People* v. *Darcy,* 101 Cal. App. 2d 665, pp. 670-672; 226 P. 2d 53):

> "At the close of direct examination of defendant, counsel for the People read to the jury records of three prior convictions which defendant

admitted he had suffered. This was for impeachment under section 2051, Code of Civil Procedure. One of these records showed that defendant was on parole at the time of the commission of the crimes charged.

"The documents consisted of (1) the certification of Clinton T. Duffy, Warden of San Quentin Prison, as to his official position, that he has in his custody records pertaining to defendant, when defendant was received at San Quentin, under commitment from what court and for what offenses, the date his terms were fixed and what they were, the date he was paroled and discharged from parole, that the copies of the commitment and fingerprints attached are true and correct copies of originals in his custody; (2) fingerprint card with defendant's signature; (3) photograph of defendant under prison number; (4) copy of judgment in Superior Court action number 70634, Los Angeles County; (5) copy of judgment in same case, another count; (6) copy of judgment in same case, another count; (7) copy of judgment in Superior Court action number 73421 before same judge; (8) the certification of Richard A. McGee, Director of the Department of Corrections, as to his official position, that he has in his custody records pertaining to defendant, when defendant was received at San Quentin, under commitment from what court, for what offense, the date his term was fixed and for how long, the date he was released on parole, that the copies of the commitment and fingerprints attached are true and correct copies of originals in his custody; (9) copy of judgment in a Santa Clara Superior Court

proceeding; (10) order to sheriff to take prisoner; (11) fingerprint card bearing defendant's signature; (12) photograph bearing prison number.

"Objection was made and overruled, that the foregoing records from San Quentin and Folsom were indecipherable; but no objection was made to this method of procedure, and no motion to strike was made. The district attorney did not read all of the documents, but from parts only of some of them.

"When a defendant in a criminal case offers himself as a witness he may be impeached on cross-examination by asking him if he has been convicted of a felony, or by showing the fact, if it exists, by *the record of the judgment.* (Italics added.) (Code Civ. Proc., Sec. 2051; *People* v. *Williams,* 27 Cal. 2d 220 (163 P. 2d 692); *People* v. *Peete,* 28 Cal. 2d 306 (169 P. 2d 924); *People* v. *Craig,* 196 Cal. 19 (235 P. 721); *People* v. *Sears,* 119 Cal. 267 (51 P. 325); *People* v. *Brancato,* 83 Cal. App. 2d 734 (189 P. 2d 504).) But beyond this the examination should not go. (*People* v. *Chin Hane,* 108 Cal. 597 (41 P. 697).)

"There should be no difficulty about what the code means when it says the 'record of the judgment.' Defendant's records in the penitentiary, his prison photographs and fingerprints, should not have been read to the jury. However, after examination of the entire case this court is not of the opinion that the error resulted in a miscarriage of justice. (Const., art. VI, Sec. 4½.)

"It is true that from a reading of the entire record in this case we are unable to say that the errors just set forth may have turned the scale

in favor of the prosecution, because the evidence of appellant's guilt was overwhelming. Therefore, it must be held that, in spite of palpable error in the admission of the criticized portion of appellant's criminal record, there was no miscarriage of justice.

"However, we cannot refrain from administering a deserved rebuke for the offer of and receipt in evidence of appellant's record in the penitentiary, his prison photographs and fingerprints. It would be an impeachment of the legal learning of counsel for the People to intimate that he did not know the introduction of the just mentioned record to be improper, wholly unjustifiable, and peculiarly calculated to prejudice the substantial rights of appellant. Such conduct tends only to prevent the accused from having that fair and impartial trial to which, whether innocent or guilty, he is entitled. Moreover, it may defeat the punishment of crime by jeopardizing a conviction when a defendant is clearly guilty. It is obvious that the questioned portions of appellant's prison record were injected into the case for the manifest purpose of prejudicing the jury against him. It is only because we are unable to say that the conviction herein might have resulted from the foregoing disregard of appellant's essential rights, that we are not compelled to reverse the judgments."

It thus appears that the first contention sought to be urged by the appellant was directly presented to the California courts on appellant's original appeal and the action of the district attorney found *not* to be that degree of prejudicial error as would warrant a

reversal under Article VI, Section 4½, of the California Constitution as it did not result in a substantial deprivation of appellant's constitutional rights in view of the overwhelming evidence of his guilt under the circumstances. The California Supreme Court in denying the petition for hearing in said matter impliedly agreed with the decision of the District Court of Appeal. Petitioner and appellant by not seeking a review of this decision by the United States Supreme Court on certiorari where the matter appeared on the face of the state record clearly did not exhaust his state remedies.

White v. *Ragen,* 324 U. S. 760, 89 L. Ed. 1348, 65 S. Ct. 978;

In re Miller (9 Cir.), 126 F. 2d 826 (cert. den. 316 U. S. 677, 86 L. Ed. 1751, 62 S. Ct. 1107, reh. den. 316 U. S. 713, 86 L. Ed. 1778, 62 S. Ct. 1307);

Morgan v. *Horall* (9 Cir.), 175 F. 2d 404 (cert. den. 338 U. S. 827, 94 L. Ed. 503, 70 S. Ct. 76);

Darr v. *Burford,* 339 U. S. 200, 94 L. Ed. 761, 70 S. Ct. 587, and annotation to 94 L. Ed. 785-795.

B. APPELLANT WAS NOT FORCED TO STAND TRIAL FOR A CAPITAL OFFENSE WITHOUT AN EXAMINATION BY A COMMITTING MAGISTRATE

Petitioner and appellant alleges that he was charged in an information filed by the District Attorney of the County of Los Angeles, State of California, with four counts of robbery while armed with a deadly weapon, and with three prior convictions;

that some 33 days after his arraignment on the information, he was taken before the Superior Court of the State of California, in and for the County of Los Angeles, and the district attorney amended the information to charge in count one thereof kidnapping for the purpose of robbery as well as four counts of robbery and three prior convictions (Tr. 5); that he was arraigned on the amended information and the following day his trial began (Tr. 5); that as a result thereof he was not given a preliminary examination on the kidnapping charge and this resulted in a lack of due process.

Section 1008 of the Penal Code of the State of California * provided that an information may be amended by the district attorney without leave of court, at any time before a defendant pleads and the court may order its amendment for any defect or insufficiency at any stage of the proceedings; however an information may not be amended so as to charge an offense not shown by the evidence taken at the preliminary examination.

Section 995 of the Penal Code provides for the setting aside of an information where the defendant has not been legally committed by a magistrate or has been committed without reasonable and probable cause and upon denial thereof under the provisions of Section 999a of the Penal Code, an application for a writ of prohibition may be made by the defendant to the appellate court.**

* Section 1008. See Appendix.
** See Appendix, Section 999a, California Penal Code.

Where no motion under Section 995 of the Penal Code has been made a defendant may not raise the point for the first time on appeal and clearly may not collaterally attack such ruling on habeas corpus.

In re Connor, 16 Cal. 2d 701, 108 P. 2d 10;
In re Northcott, 71 Cal. App. 281, 235 P. 458.

In the instant matter, there was no question but that the evidence at the time of trial supported the verdict of the trial court finding the petitioner guilty of kidnapping for the purpose of robbery. The District Court of Appeal in *People* v. *Darcy,* 101 Cal. App. 2d 665, 226 P. 2d 53, stated (p. 669):

> "The objection that the evidence is insufficient may be summarily disposed of. The record has been read, and supports beyond all reasonable doubt the findings of the jury."

The writ of habeas corpus cannot be used for the purpose of proceedings in error and it is apparent that the sufficiency of the evidence to support the conviction may not be inquired into under the writ (*Burall* v. *Johnson,* 134 Fed. 2d 614 (cert. den. 63 S. Ct. 1327, 319 U. S. 768)); *Sunal* v. *Large,* 332 U. S. 174, 67 S. Ct. 1588; *Frank* v. *Mangum,* 237 U. S. 309, 35 S. Ct. 582), so patently on habeas corpus an inquiry cannot be made into the sufficiency of the evidence adduced at a preliminary examination to support an information for a charge of kidnapping and robbery.

In re Northcott, 71 Cal. App. 281, 235 P. 458;
In re Weintraub, 61 Cal. App. 2d 666, 143 P. 2d 936.

Thus petitioner and appellant's second contention does not involve a constitutional question nor result in the deprivation of petitioner's life, liberty, or property, without due process of law.

C. PETITIONER AND APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner and appellant's contention that he was denied the effective assistance of counsel which amounted to a lack of counsel and thus due process of law, is not borne out by the record.

The record discloses that the petitioner and appellant herein did not raise the question of his counsel's competence on the appeal from the original judgment although he was represented by different counsel at the time of the appeal (*People* v. *Darcy,* 101 Cal. App. 2d 665, 226 P. 2d 53). This point was sought to be raised by petitioner in his petition for habeas corpus to the California Supreme Court (Cr. 5225).

Petitioner urges that the record discloses his counsel at trial, a deputy public defender appointed by the court, was so incompetent that his assistance amounted to no assistance and therefore petitioner and appellant was denied the right to counsel.

When a public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed

by the defendant. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents. Were this not so his client would not be afforded the full right "to have assistance of counsel for his defense" which the Constitutions, both state and federal, give to one accused of crime. With such plenary powers given a public defender when appointed to defend one accused of crime, it necessarily follows that no act of his in advising his client or in defending the latter upon the charge against him can be considered in any different light than if such act were performed by an attorney regularly employed and retained by the defendant.

In re Hough, 24 Cal. 2d 522.

In the instant case, the record does not disclose that counsel for petitioner and appellant was so lacking in competence as to amount practically to no defense at all. It is only in such case that the failure of the trial judge or prosecuting attorney to observe and correct it would be a denial of a fair trial and of due process of law. An extreme case must be shown; one where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice (*Diggs* v. *Welch,* 148 F. 2d 667 (cert. den. 325 U. S. 889, 65 S. Ct. 1576, 89 L. Ed. 2002); *Andrews* v. *Robertson,* 145 F. 2d 101-103). This petitioner and appellant has not demonstrated by the record.

Allegations of even serious mistakes on the part of defense counsel, that he failed to have a defendant testify or offer testimony in his behalf; failed to properly prepare for trial or obtain available evidence; or did not ask for a change of venue or continuance, or take an appeal are not sufficient in and of themselves to warrant habeas corpus.

Morton v. *Welch* (4 Cir.) 162 Fed. 2d 840-2;
Ex parte Haumesch (9 Cir.) 82 Fed. 2d 558;
Farrell v. *Lanagan* (1 Cir.) 166 Fed. 2d 845-7;
23 C. J. S. Criminal Law, Sec. 1443;
24 C. J. S., Criminal Law, Sec. 1948, p. 1112.

Neither the state courts on the trial, on appeal, or on habeas corpus found there was anything remotely suggesting lack of professional skill, ability, loyalty, or devotion of defense counsel to the petitioner and his cause. The federal courts are not charged with a review of the strategy of defense counsel (*Burkett* v. *Mayo,* (5 Cir.) 173 Fed. 2d 574). A defendant is entitled to a fair trial, not a perfect one. His counsel is not required to be infallible.

U. S. ex rel. Feeley v. *Ragen,* (7 Cir.) 166 Fed. 2d 976.

This is not a case of waiver of counsel but one where the precise question is presented by the record and was before the trial court. It could have been raised on appeal but petitioner and appellant did not so do. The record discloses that appellant had the effective aid and assistance of counsel. There was a judicial atmosphere throughout the proceedings and

the hearing at which petitioner was afforded an opportunity to be heard, to examine the witnesses against him, and to offer testimony was a real one and not a sham or pretense.

Petitioner and appellant was not, therefore, in the light of the decisions interpreting the Fourteenth Amendment deprived of due process of law.

In re Oliver, 333 U. S. 257, 273; 68 S. Ct. 499; 92 L. Ed. 682;

Powell v. *Alabama,* 287 U. S. 45, 68-70; 53 S. Ct. 55; 77 L. Ed. 158; 84 A. L. R. 527;

Hawk v. *Olson,* 326 U. S. 271, 273-4; 66 S. Ct. 116; 90 L. Ed. 61;

House v. *Mayo,* 324 U. S. 42, 46; 65 S. Ct. 517; 89 L. Ed. 739;

Ex parte Hawk, 321 U. S. 114, 115-6; 64 S. Ct. 448; 88 L. Ed. 572.

D. THE SENTENCE IMPOSED UPON PETITIONER DID NOT RESULT IN CRUEL AND UNUSUAL PUNISHMENT CONTRARY TO THE EIGHTH AMENDMENT TO THE FEDERAL CONSTITUTION

Section 209 of the California Penal Code, as in effect at the date of the petitioner's conviction, read as follows:

> Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by

imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm."

The constitutionality of this section was upheld by the California Supreme Court in the case of *People* v. *Tanner,* 3 Cal. 2d 279, 44 P. 2d 324.

In the case of *Bailey* v. *United States,* 74 Fed. 2d 451, in answering a similar contention, the court stated (p. 452):

"The fixing of penalties for crime is a legislative function. What constitutes an adequate penalty is a matter of legislative judgment and discretion, and the courts will not interfere therewith unless the penalty prescribed is clearly and manifestly cruel and unusual. Where the sentence imposed is within the limits prescribed by the statute for the offense committed, it ordinarily will not be regarded as cruel and unusual . . (citing authorities) . . Kidnaping is a heinous offense. A sentence to life imprisonment for transporting a kidnapped victim in interstate commerce, or for conspiracy so to transport a kidnapped victim, is not, in our opinion, cruel and unusual punishment within the constitutional inhibition."

Thus it appears that petitioner's contention in this regard is without merit as the sentence imposed upon him was within the limits prescribed by the statute

for the offense committed and has been upheld as not cruel and unusual punishment.

Hubbard v. *Jacques,* 95 Fed. Supp. 894.

Moreover, it should be noted that no such contention as is urged herein was urged by petitioner on his appeal from the original judgment of conviction where under state law he would have had full opportunity to raise such point.

III. The Petitioner and Appellant Did Not Exhaust His State Remedies or Demonstrate That Circumstances of Peculiar Urgency Exist

In accordance with the mandate of *Darr* v. *Burford,* 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761; *Ex parte Hawk,* 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, and Section 2254, Title 28 U. S. C., the United States District Court dismissed the instant petition which on its face disclosed that petitioner had failed to seek a writ of certiorari from the United States Supreme Court to review the highest state court decision on its merits (*People* v. *Darcy,* 101 Cal. App. 2d 665, 226 P. 2d 53), or to review the denial without opinion of his petition for writ of habeas corpus by the California Supreme Court in which the identical questions were sought to be presented.

In *Darr* v. *Buford,* 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, the court stated (p. 216):

> "Though our denial of certiorari carry no weight in a subsequent federal habeas corpus proceeding,

we think a petition for certiorari should nevertheless be made before an application may be filed in another federal court by a state prisoner. The requirement derives from the basic fact that this republic is a federation, a union of states that has created the United States. We have detailed the evolution of and the reason for the conclusion that the responsibility to intervene in state criminal matters rests primarily upon this Court. It is this Court which ordinarily should reverse state court judgments concerning local criminal administration. The opportunity to meet that constitutional responsibility should be afforded. Even if the District Court may disregard our denial of certiorari, the fact that power to overturn state criminal administration must not be limited to this Court alone does not make it less desirable to give this Court an opportunity to perform its duty of passing upon charges of state violations of federal constitutional rights. This Court has evolved a procedure which assures an examination into the substance of a prisoner's protest against unconstitutional detention without allowing destructive abuse of the precious guaranty of the Great Writ. Congress has specifically approved it. Though a refusal of certiorari have no effect upon a later application for federal habeas corpus, a petition for certiorari here ordinarily should be required. The answer to petitioner's argument that he should not be required to seek review here from a state's refusal to grant collateral relief before applying to other federal courts involves a proper distribution of power between state and federal courts. The sole issue is whether comity calls for

review here before a lower federal court may be asked to intervene in state matters. We answer in the affirmative. * * *

"It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court. From this conviction springs the requirement of prior application to this Court to avoid unseemly interference by federal district courts with state criminal administration."

Since the face of the instant petition discloses that the petitioner neither sought review by certiorari from the United States Supreme Court of the highest state court judgment on the appeal from his original conviction nor from the California Supreme Court's denial of his petition for writ of habeas corpus wherein the same points were presented, it is apparent that the United States District Court was not in error in dismissing the petition for writ of habeas corpus. (See, Annotation 88 L. Ed. 576-596 and 94 L. Ed. 785-795 and cases cited.)

A. THE PETITIONER DID NOT BEAR HIS BURDEN OF SHOWING EXTRAORDINARY CIRCUMSTANCES OF PECULIAR URGENCY ON THE FACE OF HIS PETITION

Under the provisions of Section 2254, Title 28 U. S. C. the federal courts may in exceptional cases, even though technically the state remedies have not been exhausted by the petitioner, entertain a habeas

corpus petition when there is "either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

That there is an available state corrective process in California by habeas corpus is well recognized (*Mooney* v. *Holohan,* 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791).

An examination of the grounds of the petition in the instant matter, namely, (1) that the conviction was based upon inadmissible evidence rendering the trial unfair as to petitioner and hence a lack of due process; (2) that he was not properly committed by a committing magistrate; (3) that he was denied the effective assistance of counsel; and (4) that the punishment imposed upon him was cruel and inhuman and thus contrary to the Eighth Amendment to the Federal Constitution, together with the prior records in his action, namely, *People* v. *Darcy,* 101 Cal. App. 2d 665, 226 P. 2d 53, and Crim. 5225, California Supreme Court, disclose that they clearly do not present circumstances of "peculiar urgency" requiring prompt federal intervention.

Essential unfairness should not be a matter of speculation but of demonstrable reality. (*Buchalter* v. *New York,* 319 U. S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492; *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269, 281, 63 S. Ct. 236, 87 L. Ed. 268. The instant case does not fall in the classification of *Frank* v. *Mangum,* 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969, and

Shepherd v. *State of Florida,* 341 U. S. 50, 71 S. Ct. 549), where there was a trial dominated by a mob so that there was an actual interference with the course of justice and hence a departure from due process of law. In this matter the whole proceeding was not a mask, where counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion. The defendant was not prejudged as guilty nor was his trial a legal gesture to register a verdict already dictated by the press or the public opinion which it generated. In the words of Mr. Justice Holmes in *Ashe* v. *United States ex rel. Vellota,* 270 U. S. at 426, 46 S. Ct. at 334:

> "Extraordinary cases where there is only the form of court under the domination of a mob * * * offers no analogy to this."

In *Soulia* v. *O'Brien,* 91 Fed. Supp. 965, at 967, in considering the effect of the proviso to Section 2254, Title 28 U. S. C., the court stated:

> "In general he (petitioner) appears to argue that if the alleged constitutional violation is an extremely flagrant one, that fact will bring the case within the exception. This argument must be rejected. The 'special circumstances' justifying the exception can only be such circumstances as would make the application for certiorari a formal and futile proceeding, certain beforehand to result only in a denial. Cf. White v. Ragen, 324 U. S. 760, 65 S. Ct. 978, 89 L. Ed. 1348."

A bare constitutional question is alone not enough. (*United States ex rel. Murphy* v. *Murphy,* 108 Fed.

2d 861, (cert. den. *Murphy* v. *Warden of Clinton State Prison,* 309 U. S. 661, 60 S. Ct. 583, 84 L. Ed. 1009); *Knewel* v. *Egan,* 268 U. S. 442, 45 S. Ct. 522, 69 L. Ed. 1036.) Nor can mere convenience justify the writ as a substitute for an appeal (*Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269, 274, 63 S. Ct. 236, 239, 87 L. Ed. 268, 143 A. L. R. 435; *Urquhart* v. *Brown,* 204 U. S. 179, 27 S. Ct. 459, 51 L. Ed. 760).

In the case of *U. S. ex rel. Auld* v. *Warden of New Jersey State Penitentiary,* 187 Fed. 2d 615, 618, the court held that the fact the relator had been sentenced to death was not sufficient, even though the State Supreme Court had denied the petition on its merits as long as the avenue of certiorari to the Supreme Court of the United States remained open.

The facts and circumstances presented in the case at bar disclose no situation of peculiar urgency requiring prompt intervention.

Sunal v. *Large,* 332 U. S. 174, 178-181, 184-7, 67 S. Ct. 1588, 91 L. Ed. 1982;

United States ex rel. Kennedy v. *Tyler,* 269 U. S. 13, 17, 46 S. Ct. 1, 70 L. Ed. 138;

Tinsley v. *Anderson,* 171 U. S. 101, 104-5, 18 S. Ct. 805, 43 L. Ed. 91.

CONCLUSION

Appellee submits that a review of the record in the case at bar discloses that the action of the Federal District Court was correct in finding that petitioner had not exhausted his state remedies which was a prerequisite to his seeking relief from the District

Court where, as here, the face of the petition did not disclose circumstances of peculiar urgency requiring the intervention of a federal court to protect the petitioner's constitutional rights. An examination of the record discloses that the federal constitution was not contravened and the action of the state courts did not result in a denial of due process of law to petitioner and appellant herein.

It is respectfully submitted that the judgment of the district court was correct and should be affirmed.

Respectfully submitted,

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APPENDIX

California Penal Code, Section 999a.

An application for a petition for a writ of prohibition, predicated upon the ground that the indictment was found without reasonable or probable cause or that the defendant had been committed on an information without reasonable or probable cause, must be filed in the appellate court within fifteen days after a motion made under Section 995 of this code to set aside the indictment on the ground that the defendant has been indicted without reasonable or probable cause or that the defendant had been committed on an information without reasonable or probable cause, has been denied by the trial court. A copy of such application shall be served upon the district attorney of the county in which the indictment is returned or the information is filed. The alternative writ shall not issue until five days after the service of notice upon the district attorney and until he has had an opportunity to appear before the appellate court and to indicate to the court the particulars in which the evidence is sufficient to sustain the indictment or commitment.

California Penal Code, Sec. 1008.

An indictment, accusation, or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. The court may order its amendment for any defect or insufficiency, at any stage of the proceedings; and the trial shall continue as if it had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which

event a reasonable continuance, not longer than the ends of justice require, may be granted. If the defect or insufficiency be one that can not be remedied by amendment, the proceeding shall be dismissed, but the defendant shall not be discharged if the court shall direct the filing of a new information or the submission of the case to the same or a new grand jury. An indictment or accusation can not be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination.

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